United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 23-0060**
	)	**Issued: June 26, 2023**
DEPARTMENT OF THE AIR FORCE, 87th FORCE SUPPORT SQUADRON, McGUIRE AIR FORCE BASE, NJ, Employer	)	

Appearances:
Russell Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On October 21, 2022 appellant, through counsel, filed a timely appeal from an April 27, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the April 27, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to modify OWCP's October 15, 2021 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On June 10, 2009 appellant, then a 52-year-old aircraft engine mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 2009 he sustained an injury when he lost control of his motorcycle during a training exercise, causing him to fall to the ground and slide, while in the performance of duty. He stopped work on that date. On June 5, 2009 appellant underwent left leg surgery, including open reduction internal fixation and lateral meniscus repair. OWCP accepted the claim for closed fractures of the left ribs and left tibia. It paid him wage-loss compensation on the supplemental rolls, effective August 3, 2009.[4] On January 6, 2010 appellant underwent total left knee replacement surgery. On July 11, 2014 he underwent total left knee revision surgery. Both procedures were authorized by OWCP.

In March 2015, appellant began to participate in an OWCP-sponsored vocational rehabilitation program designed to return him to work.

On July 7, 2020 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF) and a series of questions, to Dr. John Bannon, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that Dr. Bannon evaluate appellant's injury-related condition and assess his ability to work.

In a July 23, 2020 report, Dr. Bannon discussed appellant's factual and medical history, noting that appellant presently complained of pain in the medial area of his left knee. He reported physical examination findings, including mild varus instability upon flexion of the left knee with no effusion or joint line tenderness. Dr. Bannon advised that anterior and posterior drawer signs were negative in the left knee and he could not detect any mechanical symptoms with passive or active motion of the knee. He noted that an August 10, 2020 x-ray of the left knee revealed a well-positioned total knee replacement. Dr. Bannon indicated that appellant could not return to his date-of-injury job as an aircraft engine mechanic due to the stress that the duties of such a job would place on his left knee. However, he determined that appellant could perform light work with no restriction on the amount of time engaged in sitting. Dr. Bannon further described appellant's work restrictions in a work capacity evaluation (Form OWCP-5c) dated August 17, 2020. He advised that appellant could perform sedentary-duty work for eight hours per day and was capable of lifting, pushing and pulling up to 20 pounds for eight hours per day. Appellant could stand and walk for up two hours per day, but he could not engage in squatting, kneeling, or climbing.

In a December 3, 2020 report, Dr. Alvin C. Ong, a Board-certified orthopedic surgeon, noted that appellant reported some discomfort around his left knee joint with activities such as mowing his lawn, but denied any instability or significant discomfort or pain. He detailed physical examination findings and diagnosed presence of left artificial knee. Dr. Ong noted that the left

[4] OWCP paid appellant wage-loss compensation on the periodic rolls, effective August 24, 2014.

knee appeared, from a mechanical standpoint, to be in overall good condition. In an attached form report of even date, he indicated that appellant could lift up to 50 pounds.

In March 2021, appellant's rehabilitation counselor determined that appellant was capable of earning wages in the selected position of receptionist (Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-038). The rehabilitation counselor found that a state labor survey showed that the receptionist position was reasonably available within appellant's commuting area with an average wage of $628.40 per week. The receptionist position involved receiving visitors in an office setting, answering telephone calls, and performing some clerical duties such as typing correspondence on a computer. The receptionist position constituted sedentary-duty work and its physical requirements included occasionally lifting up to 20 pounds and frequently/constantly lifting up to 10 pounds.

In a notice dated August 25, 2021, OWCP advised appellant that, under 5 U.S.C. § 8106 and 5 U.S.C. § 8115, it proposed to adjust his wage-loss compensation based on his ability to earn wages in the constructed position of receptionist. It noted that position had been selected by appellant's vocational rehabilitation counselor and that a state labor market survey demonstrated that it was reasonably available in appellant's commuting area with an average weekly wage of $628.40. OWCP informed appellant that the duties of the position were within the work restrictions recommended by Dr. Bannon, OWCP's referral physician. It afforded him 30 days to submit evidence and argument challenging the proposed reduction.

By decision dated October 15, 2021, OWCP reduced appellant's wage-loss compensation, effective that date, based on its determination that he was capable of earning wages in the constructed position of receptionist. It found that the constructed position of receptionist had wages of $628.40 per week and had been shown by a labor market survey to have been reasonably available in appellant's commuting area. OWCP applied the principles set forth in the *Albert C. Shadrick*,[5] decision to determine the percentage of appellant's LWEC.

On October 21, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. He requested modification of the October 15, 2021 LWEC determination. During the February 17, 2021 hearing, counsel argued that the October 15, 2021 LWEC determination should be modified because appellant was not physically capable of working in the constructed position of receptionist and because his "mediocre" computer skills prevented him from performing the position. By decision dated April 27, 2022, OWCP's hearing representative affirmed OWCP's October 15, 2021 LWEC determination, finding that appellant had not met his burden of proof to modify the original October 15, 2021 LWEC determination.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.[6] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally

[5] 5 ECAB 376 (1953). *See also* 20 C.F.R. § 10.403(d).

[6] *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.[7] An employee's actual earnings generally best reflect his or her wage-earning capacity.[8] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[9] But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.[10]

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.[11] The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.[12] Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to post-injury or subsequently-acquired conditions.[13] When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.[14] Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[15] Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.[16]

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[7] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.D., id.*; *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[8] *T.D., id.*; *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[9] *S.J.*, Docket No. 19-0186 (issued August 2, 2019); *Hayden C. Ross, id.*

[10] 5 U.S.C. § 8115(a); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[11] *L.M., id.*; *M.A.*, 59 ECAB 624, 631 (2008).

[12] *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

[13] *L.M., supra* note 10; *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.4c (June 2013).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

[15] The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *L.M., supra* note 10; *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.816.6 (June 2013).

[16] 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[17] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[18]

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify OWCP's October 15, 2021 LWEC determination.

In March 2021, appellant's rehabilitation counselor determined that appellant was capable vocational of earning wages in the selected position of receptionist (DOT No. 237.367-038). The rehabilitation counselor found that a state labor survey showed that the receptionist position was reasonably available within appellant's commuting area with an average wage of $628.40 per week. The receptionist position involved receiving visitors in an office setting, answering telephone calls, and performing some clerical duties such as typing correspondence. The receptionist position constituted sedentary-duty work and its physical requirements included occasionally lifting up to 20 pounds and frequently/constantly lifting up to 10 pounds. The Board finds that OWCP properly relied on the rehabilitation counselor's opinion that appellant was vocationally capable of working as a receptionist and that the position was reasonably available.[19]

The Board further finds that the evidence of record shows that the physical requirements of the position were within the best measure of appellant's work capability at the time as represented by the evaluation of Dr. Bannon, the OWCP referral physician. In his July 23, 2020 report, Dr. Bannon indicated that appellant could not return to his date-of-injury job as an aircraft engine mechanic due to the stress that the duties of such a job would place on his left knee. However, he determined that appellant could perform sedentary-duty work with no restriction on the amount of time engaged in sitting. Dr. Bannon further described appellant's work restrictions in a work capacity evaluation dated August 17, 2020. He advised that appellant could perform sedentary-duty work for eight hours per day and was capable of lifting, pushing and pulling up to 20 pounds eight hours per day. Appellant could stand/walk for up two hours per day, but he could not engage in squatting, kneeling, or climbing. The Board finds that these work restrictions are within the physical requirements of the constructed position of receptionist.

The Board further finds that OWCP properly applied the principles set forth in the *Shadrick* decision to calculate the percentage of appellant's LWEC.[20] For these reasons, appellant has not shown that the original October 15, 2021 LWEC determination was erroneous.

[17] *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

[18] *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

[19] *See M.P.*, Docket No. 18-0094 (issued June 26, 2018) (finding that the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and that OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available).

[20] *See supra* note 5. *See also* 20 C.F.R. § 10.403(d).

Appellant argued that a modification of the October 15, 2021 LWEC determination was warranted because there was a material change in the nature and extent of the injury-related condition such that he could not perform the receptionist position.[21] However, he did not establish such a material change because he did not submit medical evidence, dating from after the October 15, 2021 LWEC determination, to support this argument. Therefore, the Board finds that appellant has not established that modification of the October 15, 2021 LWEC determination was warranted under this basis.

Appellant has not argued, and the case record does not support, that modification of the October 15, 2021 LWEC determination was warranted because he has been retrained or otherwise vocationally rehabilitated.[22] The Board finds that he has not established entitlement to such modification on this basis. For these reasons, appellant has not met his burden of proof to modify the October 15, 2021 LWEC determination.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to modify OWCP's October 15, 2021 LWEC determination.

[21] *See supra* note 17.

[22] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board